(2)

No. 90-862

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT M. WAINWRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ROBERT S. GREENSPAN
LORI M. BERANEK
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that the United States was not liable under the Federal Tort Claims Act for injuries suffered by an employee of a subcontractor working on a government facility because, under Louisiana's workers' compensation law, the United States was a "statutory employer" of the injured worker.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-862

ROBERT M. WAINWRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals, Pet. App. 12a-14a, and of the district court, Pet. App. 1a-11a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1990. A petition for rehearing was denied on October 2, 1990. Pet. App. 16a. The petition for a writ of certiorari was filed on November 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In this suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, petitioner Robert Wainwright

seeks damages from the United States for injuries that he sustained while working on a construction project at the Veterans Administration (VA) hospital in Pineville, Louisiana. The United States, through the VA, contracted with Westerchil Construction Company to build a nursing home care unit. Westerchil subcontracted with Moreno, Inc.—petitioner's employer—to install underground water pipes for the unit. Petitioner suffered a serious injury when the ditch in which he was working caved in on him. He then brought this suit against the United States for negligent failure to provide a safe workplace and to take adequate steps to protect workers against the possibility of a cave-in. Pet. App. 2a-3a, 12a-13a.

2. The government moved for summary judgment, arguing that under Louisiana's workers' compensation law the United States was Wainwright's "statutory employer" and, consequently, was not liable in tort for his injuries.[1] Pet. App. 1a-2a. The district court granted the motion. It noted that the FTCA permits "recovery in tort against the United States only 'under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'" Pet. App. 3a. Under Louisiana law, the court continued, the proper test for determining whether the government qualifies as a statutory employer

[1] Under Louisiana's workers' compensation law, workers' compensation benefits are an injured worker's exclusive remedy against his employer. When a principal contracts with an independent contractor for the performance of work that is part of the principal's business, the principal is—under circumstances discussed further below—deemed an employer of the contractor's employees. La. Rev. Stat. Ann. § 23:1061 (West 1985 & Supp. 1990); see Pet. App. 20a-24a. (As noted below, an amendment to the statute enacted in 1989 is not effective with respect to this case.)

The defense that these provisions afford to a principal is commonly referred to as the "statutory employer defense."

is "whether the contractor was performing the government's trade, business, or occupation." *Id.* at 5a-6a. Although it recognized that in *Berry* v. *Holston Well Service, Inc.*, 488 So. 2d 934 (1986), the Louisiana Supreme Court had developed a more "stringent definition of a statutory employer" for private employers, the court adhered to prior Fifth Circuit decisions holding that the *Berry* test was inapplicable as a matter of state law to governmental entities. Pet. App. 5a-6a (citing *Chaline* v. *United States*, 887 F.2d 505, 506-507 (5th Cir. 1989), cert. denied, 110 S. Ct. 1115 (1990); *Leigh* v. *NASA*, 860 F.2d 652, 653 (5th Cir. 1988); *Thomas* v. *Calavar Corp.*, 679 F.2d 416, 418-419 (5th Cir. 1982)). The district court concluded that "the United States was [petitioner's] statutory employer and his exclusive remedy is under the Louisiana Workmen's Compensation Law." Pet. App. 8a.

3. In an unpublished decision, the court of appeals affirmed, stating that, "in a thorough opinion," the district court had "correctly interpreted and applied the settled law of this circuit." Pet. App. 14a.

ARGUMENT

This is the most recent in a series of cases in which the Fifth Circuit has held that Louisiana's statutory employer defense bars an FTCA action against the United States by an individual injured while working for a government contractor on a government project. See *Giltner* v. *United States*, 894 F.2d 1334 (5th Cir.), cert. denied, 111 S. Ct. 55 (1990); *Chaline*, *supra*; *Leigh*, *supra*; *Hebert* v. *United States*, 860 F.2d 607 (5th Cir. 1986). In each of those cases, the court of appeals has held that the United States' liability should be determined by reference to state-law standards governing the availability of the statutory employer defense to governmental entities. Last Term, in *Giltner*, this Court

denied a petition for certiorari seeking review of the question whether the United States' liability should instead be judged by reference to the standard for private employers. The petition in this case presents the same question. For reasons similar to those we advanced in *Giltner*, further review is unwarranted.

1. Before the Louisiana Supreme Court's decision in *Berry*, a single standard governed the availability of the statutory employer defense to both private and governmental entities in Louisiana. In cases in which an employee of a contractor was injured while working on a public or private project, the issue was whether the worker "was injured while doing work that is part of the 'trade, business, or occupation'" of the principal. *Thomas* v. *Calavar*, 679 F.2d at 419; see *Klohn* v. *Louisiana Power & Light*, 406 So. 2d 577 (La. 1981). However, in *Berry*, a case brought by an injured worker against a private principal, the Supreme Court of Louisiana announced a "three level analysis" governing the availability of the statutory employer defense. 488 So. 2d at 937. The "central question" under *Berry* is "whether the contract work is specialized or non-specialized." *Id.* at 938. If the work is specialized, the statutory employer defense is unavailable to the principal; if the work is not specialized, the availability of the defense depends on whether the contract work "can be considered a part of the principal's trade, business or occupation" and whether the principal "is engaged in the work at the time of the alleged accident." *Id.* at 938-939.

The Fifth Circuit has determined that, as a matter of state law, the *Berry* test does not apply to cases in which the principal is a governmental entity. As the court explained in *Hebert* v. *United States*, 860 F.2d at 608, *Berry* "does not modify the rule of [*Klohn*] or [*Thomas*], which analyze the statutory employer status of government entities." The court

of appeals adhered to that understanding of Louisiana law in this case.[2]

In a recent amendment to Louisiana's workers' compensation law, the Louisiana legislature has overruled *Berry* and effectively restored a single test governing the availability of the "statutory" employer defense to all employers. As amended, the workers' compensation statute now provides, with respect to cases arising after January 1, 1990:

> The fact that work is specialized or nonspecialized, is extraordinary construction or simple maintenance, is work that is usually done by contract or by the principal's direct employee, or is routine or unpredictable, shall not prevent the work undertaken by the principal from being considered part of the principal's trade, business, or occupation, regardless of whether the principal has the equipment or manpower capable of performing the work.

La. Rev. Stat. Ann. § 23:1061 (West Supp. 1990). This new provision does not apply to petitioner's claim, which arose prior to the amendment's effective date. But this modification of Louisiana's workers' compensation scheme deprives the question presented by the petition of any prospective importance.

2. The Federal Tort Claims Act permits suit against the United States for injuries caused by the negligence of federal

---

[2] As petitioner appears to acknowledge, the correctness of the Fifth's Circuit's construction of state law presents no question calling for this Court's review. See *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."); *Frisby* v. *Schultz*, 487 U.S. 474, 482 (1988) ("Following our normal practice, 'we defer to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.'").

employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b); see 28 U.S.C. 2674 ("United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances"). In several decisions, this Court has made clear that these provisions preclude the federal government from arguing that it is not liable for "uniquely governmental" activities and from invoking governmental immunities conferred by States on state and local governmental entities. *United States* v. *Muniz*, 374 U.S. 150, 159, 164 (1963); *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 318-319 (1957); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64-68 (1955). In general, "the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred." *Rayonier, Inc*, 352 U.S. at 319; see *Raymer* v. *United States*, 660 F.2d 1136, 1140-1142 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982); *Ewell* v. *United States*, 776 F.2d 246, 248-249 (10th Cir. 1985). See generally 1 L. Jayson, *Handling Federal Tort Claims* §§ 217.01-217.03 (1989 & Supp. 1990).

Nevertheless, the courts of appeals have sometimes referred to state law rules applicable to state governmental entities to determine the extent of the United States' liability under the FTCA. In *Louie* v. *United States*, 776 F.2d 819 (1985), for instance, the Ninth Circuit concluded that the federal government's liability for an allegedly negligent failure by military police to restrain an intoxicated serviceman "rests properly on an examination of the liability of the state or a municipality under like circumstances." *Id.* at 825; see *Crider* v. *United States*, 885 F.2d 294, 296 (5th Cir. 1989), cert. denied, 110 S. Ct. 2561 (1990) (following

Louie); *Doggett* v. *United States*, 858 F.2d 555, 561 (9th Cir. 1988) (where "unique governmental functions" are involved, court seeks "to determine what liability state law attaches to * * * analogous entities subject to its jurisdiction").[3] The rationale of these decisions appears to be that when a State has exposed governmental entities to suit, a court may properly refer to laws defining the extent of their liabilities for the purpose of determining the scope of the United States' FTCA liability.

In our view, this is not an appropriate case in which to consider the question of when, if ever, a federal court may refer to state-law rules applicable to governmental entities in determining the extent of the United States' liability under the FTCA. Unlike *Indian Towing*, *Rayonier*, and *Muniz*, this is not a case in which the federal government relies on the absence of a similar private function or invokes immunity granted by a State to its governmental entities—limitations on liability that, this Court has determined, Congress meant to relinquish in the Federal Tort Claims Act. Rather, as the Fifth Circuit has read Louisiana law, Louisiana's workers' compensation scheme drew a distinction (from the time of the *Berry* decision until the recent amendment of the statute) between public and private entities with respect to injuries to employees of contractors. Such a distinction could rationally be based on intrinsic differences between the contracting activities of governmental and private entities or on policy considerations regarding the relative merits of the workers' compensation remedy and tort liability in the private and public sectors. The application of the Federal Tort Claims Act in that kind of situation presents a novel question. We are unaware of any deci-

---

[3] See generally 1 L. Jayson, *supra*, § 217.02 (collecting cases in which courts have referred to standards governing municipal liability to determine federal government's liability under the FTCA).

sion by courts outside the Fifth Circuit addressing the same or a comparable issue.[4] Moreover, as noted above, Louisiana's recent amendment to its workers' compensation law has mooted the issue as to claims arising after January 1, 1990. Under these circumstances, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ROBERT S. GREENSPAN
LORI M. BERANEK
Attorney

FEBRUARY 1991

---

[4] None of the cases cited in the petition, Pet. 20, 24, involved a situation in which the court isolated separate rules for private and governmental entities and chose to apply the latter in determining the United States' liability under the FTCA. Rather, those cases stand for the unexceptional principle that issues of liability and scope of employment must be resolved by reference to state law. See *Mandel* v. *United States*, 719 F.2d 963, 966 (8th Cir. 1983) (United States entitled to same defenses as individuals); *Raymer* v. *United States*, 660 F.2d at 1140-1144 (FTCA covers "uniquely governmental" activities); see also *DiMella* v. *Gray Lines of Boston, Inc.*, 836 F.2d 718, 720 (1st Cir. 1988) (state governmental immunities not available to United States); *Wright* v. *United States*, 719 F.2d 1032, 1034-1035 (9th Cir. 1983) (same); *Schindler* v. *United States*, 661 F.2d 552, 557-560 (6th Cir. 1981) (same).

U.S. GOVERNMENT PRINTING OFFICE 1991—282-061/20349